

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

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United States Court of Appeals
FOR THE SECOND CIRCUIT

GETTY OIL COMPANY (EASTERN OPERATIONS), INC.,
Plaintiff-Appellant-Cross-Appellee,

—against—

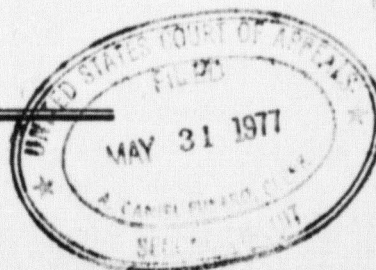
SS PONCE DE LEON, her engines, tackle, etc.,
SUN LEASING CO., and TRANSAMERICAN
TRAILER TRANSPORT, INC.,
Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING EN BANC**

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-7575

GETTY OIL COMPANY (Eastern Operations), INC.,

Plaintiff-Appellant-Cross-Appellee,

- against -

SS PONCE DE LEON, her engines, tackle, etc.,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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PETITION FOR REHEARING

AND

SUGGESTION FOR REHEARING EN BANC

Plaintiff-Appellant Getty Oil Company (Eastern Operations), Inc. respectfully requests rehearing and suggests rehearing en banc of this Court's decision dated May 16, 1977.

Preliminary

Getty respectfully submits that this Court has overlooked or misapprehended Getty's key arguments that, as to each fault charged against the WILMINGTON GETTY, the District Court improperly ignored or impliedly rejected - without basis or explanation - the uncontradicted evidence establishing that each asserted fault was not a fault if measured by the proper standard of reasonable care or did not contribute to the collision. This Court did not discuss any of these key arguments in its decision dated May 16, 1977. The District Court's decision and its affirmance would be contrary to law by holding the anchored WILMINGTON GETTY to a standard stricter than that of reasonable care - obliging her to anticipate and overcome the moving PONCE DE LEON's unforeseeable gross negligence.

On rehearing, Getty respectfully requests reconsideration of each of the following points.

A. The District Court erroneously ignored the uncontradicted evidence establishing that it was impossible in the circumstances here for the WILMINGTON GETTY's mate to make an accurate and useful radar plot between the radio exchange and visual sighting of the PONCE DE LEON. The failure to engage in an impossible and thus useless task did not constitute contributory negligence.

The District Court held that the WILMINGTON GETTY was at fault for not making a manual radar plot (JA 108, 124-125), but never

specifically stated why this omission was a fault or how it contributed to the collision.* This Court affirmed, Slip Opinion p. 3581, without discussing this specific point. Neither the District Court nor this Court mentions giving any consideration to the uncontradicted evidence of Getty's radar expert, Fonda, that if an approaching ship were changing both course and speed (as the PONCE DE LEON was), it would be impossible to forecast how close it would come, and indeed, the radar indications could be "very confusing and misleading" (JA 540-541, 553).** [Fonda's evidence concerning basic limitations on radar's usefulness is fully in accord with the radar authorities cited at page 45 of Getty's Main Brief.]

On Fonda's evidence it is clear that the WILMINGTON GETTY's mate could not forecast from a radar plot that the PONCE DE LEON would not do as she had stated by radio, but inexplicably would ultimately come a few feet too close to the WILMINGTON GETTY. Thus, reasonably considered, the WILMINGTON GETTY's mate could not know until visual sight - seconds before, and too late to avoid, collision - that she should try to move to help the PONCE

* Presumably the District Court assumed that if a radar plot had been made, it would have provided a warning to the WILMINGTON GETTY in time to try to move. See Getty's Main Brief, pp. 44-46, regarding the impossibly short time in which such a plot would have to be made.

** This testimony was quoted in Getty's Reply Brief, p. 24.

DE LEON avoid collision. [See Getty's Main Brief, pages 20-24 and 44-46, and Getty's Reply Brief, pages 22-28.]

The PONCE DE LEON had the burden of proving contributory fault of the WILMINGTON GETTY. However, it offered no evidence to contradict Fonda's testimony as to how ineffectual a radar plot would have been due to the PONCE DE LEON's continually changing course and speed, - although its expert, Dervin, had remained in court for the purpose of hearing Fonda's evidence and, presumably, offering contrary evidence if he differed from Fonda (JA 534). Instead the PONCE DE LEON merely argued that there was time to make a radar plot, totally avoiding the key issue of whether a useful radar plot was possible in the circumstances. Fonda's evidence on this point was thus entirely undisputed and should have been accepted by the District Court.

It may be argued that the District Court must have considered and implicitly rejected Fonda's evidence. However, such an argument would fail to meet the issue, for the District Court should not have disregarded the only material evidence on the important issue of whether a radar plot would have been useful under the circumstances. The District Court clearly overlooked or misconceived Fonda's undisputed evidence and therefore mistakenly concluded that the WILMINGTON GETTY's failure to make a radar plot in the material three minutes between the radio conversation and collision was

negligent and contributed to the collision. However, if Fonda's undisputed evidence is accepted, the omission of a manual radar plot was obviously neither negligent nor causally related to the collision - because a plot could not have furnished information sufficiently accurate to require the WILMINGTON GETTY, as a matter of reasonable prudence, to take avoiding action by letting go her chain [which, to be effective, would have to be done two minutes before collision or only one minute after the radio communications] or going astern on her engines.

The District Court's disregard of Fonda's undisputed evidence led directly to its conclusion that the WILMINGTON GETTY's failure to make a radar plot was a contributory fault. In Nymphe Steamship Co. v. Atlantic and Gulf Grain Associates, (1 Cir. 1967) 383 F.2d 876, 878-9, such disregard of undisputed evidence or misconception as to its significance impelled the Court of Appeals to remand the case to the District Court for a new trial.

However, remand is not necessary. Acceptance of Fonda's undisputed and reasonable evidence that a radar plot would have been ineffectual in this case establishes such to be an undisputed fact, and this Court is free to substitute its finding for the District Court's.

A leading case on this point is Orvis v. Higgins, 180 F.2d 537 (2 Cir. 1950) cert. denied 340 U.S. 810 (1950), an estate tax

refund case hinging on whether reciprocal trusts had been created. The District Court found as a fact that the trusts were not reciprocal. This Court reversed, finding the trusts reciprocal and stating, through Judge Frank, the standards for review when undisputed facts were involved:

"Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) if he decides the fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his findings. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. (c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances." 180 F.2d 539-540. (Emphasis added.)

And, after a careful review of the record, this court said:

"*** the evidence consists in large part of facts neither side disputes, in circumstances such that the trial judge's evaluation of credibility becomes unimportant. In short, for reasons we shall state, the undisputed facts are such that we have a 'definite and firm conviction' that the trial judge was mistaken in finding *** We therefore hold that finding 'clearly erroneous' ***." 180 F.2d 540.
(Emphasis added.)

See also: Falletta v. Costa Armatori, 476 F.2d 316, 318 (2 Cir. 1973); Sheehan v. Moore-McCormack Lines, Inc., 441 F.2d 360, 363 (2 Cir. 1971); Oliveras v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814, 815 (2 Cir. 1970); United States v. United States Gypsum Co., 333 U.S. 364, 394-396 (1948); and 5A Moore's Federal Practice § 52.04

(which considers Judge Frank's majority opinion in Orvis v. Higgins persuasive, p. 2688).

Possibly Fonda's evidence and radar's fundamental limitations have been overlooked because of the courts' frequent reference to the desirability of radar plotting. However, there is no universal duty to make a radar plot, as a plot does not always have value. In Union Oil Co. v. The Tugboat San Jacinto, 409 U.S. 140, 142, 146 (1972), the Supreme Court granted certiorari expressly to consider abandoning the divided damages rule. Nevertheless, it first reviewed the merits and exonerated the moving tanker SANTA MARIA although its pilot saw the meeting tug SAN JACINTO on radar but did not plot it, expecting it to pass port-to-port. There were no radio communications between the vessels. While out of sight in fog the tug made a left turn and emerged from the fog crossing the SANTA MARIA's bow; as the SANTA MARIA was unable to stop her headway in time to avoid collision with the tug's tow, collision ensued. The Court of Appeals had divided damages, but the Supreme Court reversed, exonerating the tanker from liability for the statutory violation of immoderate speed and holding the tug in sole fault, stating (p. 146):

"Those in charge of the navigation of the tanker cannot be faulted for not anticipating the tug's wholly unorthodox maneuver in darting across such a channel. The Victory & The Plymothian, 168 U.S. 410 (1897) ... The tug emerged from a fog bank only 900 feet from the tanker on a course and for reasons that no seaman could, under the circumstances, have anticipated."

A fortiori the anchored WILMINGTON GETTY should not have been condemned for not making a useless radar plot and for not having anticipated the PONCE DE LEON's unorthodox maneuver - her unnecessary close-shaving of an anchored ship, seen on radar long before collision and spoken to three minutes before collision.

Union Oil is also pertinent in that, although the Supreme Court was obviously willing to reconsider the divided damages rule, it exonerated a ship (which had been held in statutory fault) in part because of the unforeseeable and grossly negligent conduct of the other vessel.

Finally, as this Court recently stated in reversing the District Court in American Smelting and Refining Co. v. SS Irish Spruce, 548 F.2d 56, 60 (2 Cir. 1977):

"Liability must rest on causal relationship between the negligent aspect of the conduct and the harm resulting from the conduct."

As a radar plot by the WILMINGTON GETTY would have accomplished nothing, its omission could not have contributed to the collision.

As developed below, if a radar plot would have been of no value, then it necessarily follows that the WILMINGTON GETTY had no duty to let go her anchor chain or go astern on her engines, at least before visual sight only seconds before collision.

P. Since no timely warning of danger could have been obtained from a radar plot, and it is uncontradicted that the PONCE DE LEON gave no warning before visual sight that she would not carry out her radioed intention to pass clear, the District Court's conclusion that the WILMINGTON GETTY was required to move at some unspecified time before visual sight to give the PONCE DE LEON "more latitude" can only be based on a misapprehension of the facts or the law and should be reversed.

It is undisputed that, if she exercised due care, the PONCE DE LEON had ample room to pass the anchored WILMINGTON GETTY safely. Please see Getty's Main Brief, Annex I, and Reply Brief, pages 14-15.

Thus we presume that both the District Court and this Court, in requiring the WILMINGTON GETTY to give the PONCE DE LEON "additional latitude" (JA 123) or "more space to pass," Slip Opinion 3581, assumed that the WILMINGTON GETTY would have been able by a radar plot to obtain a timely warning that the PONCE DE LEON would strike her, despite the radio exchange. No other reason exists.

Certainly there is no duty on the part of an anchored ship to move, unless she somehow receives a timely warning of the need to attempt avoiding action. None of the cases cited by the District Court or by this Court imposes a duty to move before receipt of a reasonable warning. In The Richmond, 63 F. 1020 (2 Cir. 1894), cited at Slip Opinion 3581, the moving vessel had specifically requested the anchored vessel to move, 63 F. at 1021, and the anchored vessel was properly held contributorily liable for failing to move after that timely warning. The same situation existed in

Wells v. Armstrong, 29 F. 216 (S.D.N.Y. 1886) cited by the District Court (JA 123). These cases differ sharply from the situation of the WILMINGTON GETTY, which had received the PONCE DE LEON's radio advice that she saw the WILMINGTON GETTY and would pass clear but which never received a request to move or even a warning of risk.

Nothing in Sun Oil Co. v. SS Georgel, 245 F. Supp. 537 (S.D.N.Y. 1965), aff'd 369 F.2d 406 (2 Cir. 1966), requires an anchored vessel to move before receiving reasonable warning that evasive action would be necessary to avoid collision. Indeed the District Court there properly stated:

"A vessel at anchor which can take action to avoid collision must do so. But an anchored vessel is at first entitled to rely on moving vessels to avoid her. The Lady Franklin, 14 Fed. Cas. p. 943 (No. 7,984) (D. Mass. 1873). Her first duty is to remain at rest. The Ceylon Maru, 266 F. 396 (D. Maryland, 1920), reversed on other grounds, 281 F. 538 (4th Cir. 1922). If she has the power to avoid the accident, she should do so. However, she is under no obligation to resort to extraordinary maneuvers" 245 F. Supp. 545.

(Emphasis added.)

Here the WILMINGTON GETTY was not required to move as soon as she vigilantly observed the PONCE DE LEON turn out of the channel - the vessels were then one mile apart. Her first duties were to remain at rest and to communicate with the PONCE DE LEON, which she did promptly. At 1311 hours or three minutes before collision, when the vessels were .5 to .6 mile apart, the PONCE DE LEON stated her intention to pass clear, which was well within her capability. No

reason existed then for the WILMINGTON GETTY immediately to disbelieve the PONCE DE LEON's radio advice. After the radio communications the WILMINGTON GETTY's mate watched the PONCE DE LEON's progress on radar and it appeared to him that she would pass clear ahead, which she nearly did, ultimately only barely striking the WILMINGTON GETTY's outstretched anchor chain.

Since it would have taken approximately two minutes to let go the anchor chain, the WILMINGTON GETTY would have to have been aware that there was reason for her to move no later than 1312 hours or only one minute after the radio communications in order to have time to let go the chain to help avoid collision. Even apart from Fonda's undisputed evidence there is no evidence whatever that radar plotting would have afforded the WILMINGTON GETTY warning by that time. Thus there is no reasonable justification for counting it a fault that she did not let go her chain - when she clearly did not receive a timely warning mandating that action, by radar or otherwise.

At a minimum therefore it was error to condemn the WILMINGTON GETTY for failure to make a [useless] radar plot or failure to let go her anchor chain [in the absence of timely warning, i.e., knowledge that the situation was dangerous at least two minutes before collision].

The criticism of the WILMINGTON GETTY for not being on standby also was unjustified, if the situation is analyzed properly. With a radar plot being ineffectual, she had no duty to try to move until the PONCE DE LEON came into visual sight. By then, under any reasonable analysis, it was too late to move significantly by going astern on her engines, even if they had been on standby, considering the PONCE DE LEON's high speed. Traveling at 12 knots (Slip Opinion 3571) the PONCE DE LEON was covering 1200 feet per minute, or 20 feet per second. With visual sight at only "25 to 100 feet" (Slip Opinion 3571) the PONCE DE LEON covered that distance in no more than five seconds. Giving time for the WILMINGTON GETTY's mate to (1) move to the engine telegraph and (2) signal the engine room, for her engineer to (3) operate the engine controls, and (4) for the engine to build up sufficient speed to move over 20,000 tons of cargo plus ship's weight against the holding force of her anchor - there is no realistic probability that the WILMINGTON GETTY could have moved significantly between visual sight and collision. Contributory liability should not rest on a requirement to perform improbable maneuvers suggested by a grossly negligent ship as a matter of pure hindsight. If the WILMINGTON GETTY had moved that movement would initially have tightened the chain, reducing the room available for the PONCE DE LEON to pass clear. Under those circumstances, can it be reasonably said that the WILMINGTON GETTY

had a duty to go astern on visual sight? Getty submits it cannot.

C. In holding the WILMINGTON GETTY contributorily liable for failing to sound additional security calls (at unstated intervals), the District Court overlooked or misapprehended the undisputed fact that the PONCE DE LEON had ample time and space to alone avoid collision after the WILMINGTON GETTY's timely radio warning. Therefore, in a legal sense, the absence of additional security calls did not contribute to the collision, as the PONCE DE LEON's master admitted.

Instead of crowding the airways with periodic security calls, the WILMINGTON GETTY had established an alternate precaution of monitoring her radar and radio and being ready to give a specific warning to approaching ships. To require the WILMINGTON GETTY to sound additional security calls, and for the benefit of the PONCE DE LEON alone [as numerous other vessels safely passed her without such requirement], is to require her to anticipate the PONCE DE LEON's grievous faults. In any event security calls were not necessary even for the PONCE DE LEON because she detected the WILMINGTON GETTY at two miles, was contacted by the WILMINGTON GETTY when she turned out of the channel and had advised the WILMINGTON GETTY she would pass clear three minutes before collision when the ships were .5 to .6 mile apart; on the undisputed evidence of the PONCE DE LEON's own expert, she then had ample time and space to alone avoid collision. [Please see Getty's Main Brief, pages 12-13, 18-20, 31-32 and Getty's Reply Brief, pages 11-12.]

The PONCE DE LEON's master admitted that the absence of security calls had nothing to do with the collision. (JA 348.)

Since, without general security calls, the PONCE DE LEON admittedly knew the WILMINGTON GETTY's location and situation in ample time to pass clear, we submit that the absence of security calls was not a proximate cause of collision. The WILMINGTON GETTY should not have been condemned for their omission.

D. If, upon reconsideration, this Court decides there was error in holding the WILMINGTON GETTY in fault for all or any of the four points of blame against her, her proportion of liability should be eliminated or reduced.

Obviously if the WILMINGTON GETTY is held free from contributory fault, no liability should attach. It also logically follows that, if there was error in assigning one or more of the points of blame against her, her proportion of liability should be appropriately reduced - as the grounds for the District Court's assessment of proportionate liability would have been reduced.

E. Even if this Court should decline, on reconsideration, to find fewer faults on the part of the WILMINGTON GETTY, it should reconsider the proportions of liability imposed by the District Court in the same way as other conclusions of law, free of the "clearly erroneous" rule applicable to findings of fact. On such reconsideration it should alter the proportions of liability in favor of the WILMINGTON GETTY.

Getty respectfully submits that the ruling herein that a District Court's apportionment of fault should be treated as a finding of fact subject to the F.R.C.P. 52(a) "clearly erroneous" rule, is wholly inconsistent with and would fragment this Court's

long-held doctrine (contrary to other circuits) that a trial judge's conclusions as to negligence, including proportionate contributory negligence, should be reviewed as conclusions of law not subject to the "clearly erroneous" rule. A leading case reiterating that rule is Mamiye Bros. v. Barber Steamship Lines, Inc., 360 F.2d 774 (2 Cir. 1966). Mamiye discusses (pages 776-7) the reasons for the rule which, briefly, are that only by an "unimpeded" review of a trial judge's results can an appellate court (1) determine whether a trial judge correctly apprehended the manifold specifications of the general standard of negligence and (2) achieve reasonable consistency and uniformity within a circuit of trial judges' applications of legal standards.

This Court has applied the principles of Mamiye to its review of contributory proportionate negligence. In Falletta v. Costa Armatori, 476 F.2d 316, 318 (2 Cir. 1973) it reversed a conclusion of 10% contributory liability and, in Sheehan v. Moore-McCormack Lines, Inc., 441 F.2d 360, 363 (2 Cir. 1971), it reversed a conclusion of 50% contributory negligence - stating in both cases that conclusions as to contributory negligence were not subject to the "clearly erroneous" standard.

We respectfully submit that the principles in Mamiye, and the reasons for them, apply with equal force to conclusions as to apportionment of liability, which necessarily depend on considerations

substantially identical to those on which the initial determination of negligence rests. Apportionment of liability does not depend on purely factual considerations as does determination of the quantum of damages. Apportionment is an appraisal of the relative legal weights to be given to the court's conclusions as to negligence which are themselves treated as conclusions of law for purposes of review in this circuit. In many cases apportionment will affect the result as much as or more than the determination of whether liability exists. Accordingly, apportionment merits "unimpeded" review no less than the initial determination of negligence for the very reasons stated in Mamiye, supra p. 14, and, in all logic, the Mamiye principle should apply.

None of the cases referred to in this Court's decision, Slip Opinion 3576-78, cites Mamiye. The Second Circuit cases, either antedated Mamiye or overlooked it. The Fifth and Seventh Circuit cases should not control, as both of those circuits reject the Mamiye principle.

Conclusion

It is therefore respectfully requested that this Court grant this petition and on rehearing exonerate the WILMINGTON GETTY or reduce her proportion of liability.

Dated: May 31, 1977

Respectfully submitted,

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76-7575

CERTIFICATE OF SERVICE OF
PETITION FOR REHEARING

WE HEREBY CERTIFY that two (2) copies of the attached
Petition for Rehearing was this date served by mail on the
following:

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May 31, 1977

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